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## CONSTITUTIONALITY OF STATUTE PREDICATING LIEN ON PROPERTY LEASED FOR SALOON PURPOSES ON JUDGMENT AGAINST LESSEE SUED SOLELY.

In Eiger v. Garrity, 38 Sup. Ct. 298, it was held by U. S. Supreme Court that a statute providing for a lien on premises leased for the purpose of, or used by consent of owner for, conducting a saloon, arising out of a judgment recovered against the saloon keeper for injury or damage suffered by any one from the sale of intoxicants, did not amount to a taking of property without due process of law.

The facts in this case show that a wife sued a saloon keeper for damage resulting to her by reason of selling liquor to her husband. There was default by defendant and, in a trial, judgment was rendered in plaintiff's favor for damages. On this judgment she sued the owners of the property to impress the lien on the premises leased to the judgment defendant.

There was demurrer to the petition, which, being overruled and owners standing thereon, there was judgment rendered establishing the lien.

It is to be noticed that the owners had no day in court so as to contest the right of suit or in fixing the amount of the damages.

The Supreme Court said: "The stress of the argument for plaintiff in error is laid upon the want of notice to the landlord and the lack of opportunity to be heard as to the right of recovery and the amount thereof before his property can be subjected to the lien of such judgment. But the effect of this statute is to make the landlord responsible only when he rents his property for the use and sale of intoxicants, or knowingly permits its use for that purpose. The statute has the effect of making the tenant the agent of the landlord for its purposes, and through this agency, voluntarily assumed, the landlord becomes a participant in the sales of intoxicants and is responsible for the consequences resulting from them."

The court from this proceeds to declare the statute valid under state police power and upholds the judgment establishing the lien provided by statute.

Is the reasoning of the court in regard to agency in the tenant and the participation by the landlord as a principal in the sales an answer to the contention of lack of opportunity in the landlord to be heard in defense of the claim for recovery and as to amount thereof? It seems to us that it is not.

Let it be conceded, that the statute does create the relation of principal and agent, yet it is not specifically provided, that the principal shall be bound in a suit against the agent. If not, does not the general rule obtain, that for the default or tort of the agent the principal must be sued?

It is not in the creation of the relation of principal and agent that the latter may be sued so as to bind the principal. It is only in the way of evidence of such creation and of acts done within the scope of the agency, that the principal may be held at all. He has the right to contest these points. Their establishment binds the principal and releases the agent, unless in a transaction the latter acts for an undisclosed principal.

It may be, that in a suit against a principal or against an agent, his interest may be adverse to his principal. If liability is fixed upon the one sued, it may operate to release the other. Therefore he must be heard before he may be bound.

But the court says also the "landlord becomes a participant in the sales of intoxicants and is responsible for the consequences resulting from them." But how does this conclusion, as matter of law, make him bound by a judgment against another? If he is in effect charged as a joint tortfeasor, judgment against him as such should be sought in a suit against him.

It is to be admitted that there are statutes in which sureties, as in the case of statutory bonds, "submit themselves to the acts of the principal and to the judgment as itself a legal consequence." By this "they are represented in the proceedings by their principal and are bound by his acts. They thus have their day in court," Evans v. Kloeppel, Fla., 73 So. 180. But the court in the instant case argues that, purely as principal and agent or because the statute makes the lessor a joint tortfeasor, the judgment against the agent or the other joint tortfeasor becomes conclusive against the lessor. We believe this to be sound in principle and dangerous in analogy.

The decision in the principal case no doubt could more properly be sustained on the theory that knowingly leasing property for dramshop purposes was an act which, under the police power, might be punished by the imposition of a penalty. This penalty could be either an arbitrarily fixed amount or an amount varying in each case according to the damages resulting to those injured by the wrongful act. In such a view of the case it would be unimportant that the amount, thus regarded as a penalty, is determined in an action to which the offending landlord is not a party. He knows, when he leases his property for purposes regarded as injurious to society, that he may have to pay a penalty (not damages), the amount of which, it is true, is undetermined, but which is to be fixed in the manner provided by law.

## NOTES OF IMPORTANT DECISIONS.

DESCENT AND DISTRIBUTION—WAIVER BY WIDOW OF PORTION OF ESTATE VESTED IN HER BY STATUTE.—In Fischer v. Dolwig, 166 N. W. 793, decided by Supreme Court of North Dakota, it was held by a majority of three, that the widow was barred by acquiescence or laches in failing to claim a year's support. The facts are somewhat involved.

There it appears that before the marriage of plaintiff to decedent, there was an oral agreement between her and her intended husband for a consideration paid to waive all rights to his estate; that when he died she consented to the appointment of an administrator; that she waived service of all citations of notice that otherwise might be required and consented to rendition of final decree in the administration. This final decree was rendered and she was decreed to have no interest in the estate and of the intent to claim by the next of kin she was fully apprized. There was decree adjudging all of the estate to such next of kin. Some time later, the estate being wound up and the administrator discharged, the widow asked that the decree be set aside and there be set apart to her the exemption provided by statute. The Supreme Court affirmed judgment of the trial court in defendant's favor.

The majority held, that the oral agreement was void under the statute of frauds under North Dakota statute, but her waiver and knowledge of what would be claimed as to the widow having no interest in the estate and her failure to appeal from the decree barred her rights in the estate.

One of the judges, specially concurring, speaks of the duty of the probate judge to set apart to the widow the exemption allowed by the law, and of its being not "thwarted or defeated even by the previous private contract of the immediate beneficiary," but in this case she was fully advised of the contention of those adversely interested in the estate about the effect of the oral antenuptial contract and of her right to appeal and no fraud appeared in any way. Therefore, she was held to have slept upon her rights, all this enuring to the advantage of those claiming under the decree of the probate court.

Dissentients said that the exemption was not under the statute any part of the estate except for the purpose of ascertaining the amount to be set apart to the widow, and that it could only be subject to charges of last

illness and funeral expenses, as to which there was no claim. This setting apart is mandatory and requires no application therefor by a beneficiary. It is also recited that generally it is for the benefit of the family of decedent and for no particular member thereof. It is the policy of North Dakota law that it be set apart.

*Quaere:* Do the distributees take the estate, when no setting apart of the exemption has been made, subject to an implied trust? Or does a general order of the probate court distributing it, without regard to the absolute right of the widow or family in the exempted part, operate as *res judicata*, in favor of the distributees?

It seems to us, that the inclusion in the estate of property that really is no part thereof does not vest that property in the distributees of the estate and that the mandatory terms of the North Dakota statute did not oblige the widow, in this case, and the members of a decedent's family, in another case were not bound by the decree any more, than had it included property, that never had belonged to the estate of decedent. If the statute segregated the property from the estate, this was the same as if it had never been a part thereof. Furthermore, if the position of distributees had never been changed by the alleged waiver, they taking with notice of the absolute right of the widow, how were they prejudiced thereby? What had they paid in consideration of her surrender of that absolute right? In the view that they are trustees, there was merely question of statute of limitations barring her right to sue, or it may be, of laches, so far as time is concerned, or of third persons being prejudiced.

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ATTORNEY AND CLIENT—LIEN IN EXCESS OF SUM FOR WHICH CLIENT SETTLES SUIT.—Levy v. Public Service Ry. Co., 103 Atl. 171, decided by New Jersey Court of Errors and Appeals, shows a suit by an attorney against a company with which his client had settled a claim in disregard of notice of attorney's lien.

It appears that the client settled for $30.00 and the attorney sued the company to enforce his lien under a contract providing for a 50 per cent compensation and the trial court awarded him judgment for $100.00, or more than three times the amount for which settlement was made.

The Supreme Court of New Jersey reversed the judgment upon the theory that the written contract confined the recovery to 50 per cent of the amount, and this reversal the Court of Errors and Appeals affirms, but rejects the reasoning employed on the attorney's contention that the 50 per cent applied only to "all moneys received by him by way of settlement," and was wholly silent as to a settlement made by the client.

The Court of Errors and Appeals rules, therefore, that this being true, there either is no lien at all as against the company or it depends upon the right of the client to settle. It is said the lien statute "does not take away the rights of parties to settle their litigations." It was thought that any claim for compensation was, so far as lien is concerned, on the "cause of action, suit and claims," and this was limited by what had been satisfied. But it was thought that as between attorney and client this might not be conclusive of the value of services rendered by the attorney to his client. For such there ought to be a suit in which the client was entitled to have his day in court. This was a matter that under the statute in no way affected the company the client had settled with.

As the case was reversed without remand it is to be considered, that the way in which it was provided settlement only could be made, the attorney had no lien at all protected by the statute. When the attorney attempted to provide only for settlement by himself, it ought not to have taken away his client's right to settle.

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PARENT AND CHILD — BURDEN OF PROOF ON STRANGER FURNISHING SUPPORT TO CHILD.—In Dyer v. Helson, 103 Atl. 161, decided by Maine Supreme Judicial Court, it is held, that presumptively a child away from the home of his parents may not be supplied support by a stranger without the latter showing there was immediate necessity therefor and such necessity was occasioned by the parent, who is not presumed to have neglected his duty or as being unwilling to perform it.

Further, it was said that, if a child leaves his home to seek his fortune or to avoid discipline, he carries no credit. Such a presumption as exists in favor of a parent necessarily is subject to great latitude in its application. If the child is male or female, or is of very tender years, or is in immediate danger as to its life or health, humanity may intervene so far as immediate relief is concerned, no matter what may have been the previous conduct of it or its parents. Necessarily, relief must be temporary.

In this case a child was given support by a stranger for more than six years and it was claimed that the parent did not treat him

with the kindness ordinarily shown in their circumstances in life, but it was said this was not shown by a preponderance of the evidence. The father was held not liable to plaintiff.

It seems to us, that it was unnecessary for the father to have been put upon his defense at all. For one to take up and support a child for such a long period, because a parent may not be doing his duty to the child, is to vest the former with a kind of guardianship over the domestic affairs of another. He is rather a volunteer in a matter where the state as *parens patriae* has a right to intervene. It is not designed that a jury should be vested with authority to express its opinion in a verdict regarding such a matter as this. The currents of sympathy would thus be allowed to be capitalized in favor of those presuming to act in the name of charity, when real motives might be very different. And then a way would be opened for invading the sanctities of home for one's personal financial advantage.

## DOES AN ACT OF GOD EXCUSE A CARRIER, WHERE THERE HAS BEEN UNREASONABLE DELAY IN TRANSPORTING?

The legal term "Act of God," has been defined as such an act as could not happen by the intervention of man,[1] while Lord Mansfield states that by "Act of God" is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as violence of the winds or seas, lightning, or other natural accident.[2] Another definition is any accident due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented.[3]

It has long been the rule that an "Act of God" excuses the failure to discharge a duty, where it was the sole cause or reason for the neglect. This rule is founded upon the maxim, *"Lex Neminem cogit ad impossibilia."* (The law requires nothing impossible),[4] but when the evidence of the cases show other causes contributing to the loss along with the Act of God, then the great conflict of authority develops.

In the law of carriers this question is one of great importance and the purpose of this article is to consider the effect on the defense of Act of God, where there has been a loss caused partially by the delay of the carrier in transporting the goods. According to one line of decisions, negligent delay in transporting, or delivering goods will not render the carrier liable for subsequent loss or injury thereto by an Act of God, where the peril was not reasonably to be anticipated, although had the goods been transported with reasonable diligence they would not have been subject to such loss.

This rule has been followed consistently by the federal courts[5] and in about nineteen of the state courts.[6] The foregoing doctrine is predicated on the view that, if the

(1) Niblo v. Binsse, 44 Barb. (N. Y.) 54, 62.

(2) Trent, etc., Nav. Co. v. Wood, 4 Dougl. 290, 287, 26 E. C. L. 479, 99 Reprint 884. See also Forward v. Pittard, 1 T. R. 27, 28, 99 Reprint. 953, 1 E. R. C. 216.

(3) 1 Corpus juris, pg. 1174.

(4) Southern Pac. Co. v. Schoer, 114 Fed. 466, 472, 52 C. C. A. 268, 57 L. R. A. 707.

(5) Insurance Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65; St. Louis, etc., R. Co. v. Comm. Union Ins. Co., 139 U. S. 223, 11 S. Ct. 554, 35 L. Ed. 154; Scheffer v. Washington City Midland, etc., R. Co., 105 U. S. 249, 26 L. Ed. 1070; Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Empire State Cattle Co. v. Atchison, etc., R. Co., 135 Fed. 135, same case in 210 v. S 1, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; Kennedy v. The R. D. Bibber, 50 Fed. 841, 2 C. C. A. 50.

(6) Hutchinson v. U. S. Express Co., 63 W. Va. 128, 14 L. R. A. (N. S.) 393; Herring v. Chesapeake, etc., R. Co., 101 Va. 778, 45 S. E. 322; International, etc., R. Co. v. Bergman (Tex. Civ. App.), 64 S. W. 999; Lamont v. Nashville, etc., R. Co. (Tenn.), 9 Heisk. 58; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Armstrong v. Ill. Cent. R. Co., 26 Okla. 352, 29 L. R. A. (N. S.) 671; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Gen. Fire Ext. Co. v. Carolina, etc., R. Co., 137 N. C. 278, 49 S. E. 208; McClary v. Sioux City, etc., R. Co., 3 Neb. 44, 19 Am. Rep. 631 (but see Wabash R. Co. v. Sharpe, 76 Neb. 424, 107 N. W. 758); Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315 (but see also Armentrout v. St. Louis, etc., R. Co., 1 Mo. App. 158); Yazoo, etc., R. Co. v. Millsaps, 76 Miss. 855, 25 So. 672; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Denny v. New York Cent. R. Co., 13 Gray 481, 74 Am. Dec. 645; O'Brien v. McGlinchy, 68 Me. 552; Dalzell v. The Saxon,

carrier could not reasonably have forseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss and should be disregarded in determining the liability for such loss.

A federal court in discussing the basis of this doctrine says: "'*Causa proxima Non remota spectatur.*' An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated."[6a]

An eminent text book writer in considering the point cites an early Pennsylvania case and discusses it as follows: "In that case common carrier undertook to transport goods from Philadelphia to Pittsburg by canal. While on their way the goods were destroyed by an extraordinary flood. There was evidence that the goods would not have been at the place of injury but for their having been delayed by the lameness of a horse attached to the boat; and the complaint was that the culpability of the defendants in allowing the boat to be delayed by the lameness of the horse, having exposed the boat to the flood, was the proximate cause of the loss. Now, if human foresight could forsee the exact time when such a flood might be anticipated, the argument would be unanswerable, but, as this is impossible, and an accident of the sort is as likely to overwhelm a boat that has been moved with due diligence as one that has been unreasonably delayed, it is obvious that the antecedent probabilities are equal, that the delay will save the boat instead of exposing it to destruction. As is said by the court in the case referred to: 'A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use, but it could not anticipate that, by reason of the lameness, the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would be no proper measure of the blacksmith's liability.' "[7]

Another writer in discussing leading cases upon this subject says: "In the following cases the admitted or established negligence of the defendant was held not to be the effective legal cause or proximate cause of the damage, or injury for which recovery was sought. It is obvious that in these cases the damage could not be said to be the natural result of the negligence declared on. It was simply due to some other factor. And the conclusion reached in these cases must be the same whether liability is supposed to extend to all natural consequences or only to such as may be foreseen."[8]

In a Michigan case[9] Justice Marston speaking for the court says upon this subject: "It may be true that, had there been no delay whatever on the part of the defendant, the loss would not have happened. The law, however, cannot enter upon an examination of, or inquiry into, all the concurring circumstances which may have as-

10 La. Ann. 280; Rodgers v. Missouri P. R. Co., 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 12 Ann. Cas. 441; Seaboard, etc., R. Co. v. Mullin, 70 Fla. 450, 70 So. 467; Gleeson v. Virginia Midland R. Co., 16 D. C. 356; Chicago and E. Ry. Co. v. Schaff Bros. (Ind. App.), 117 N. E. 869; but see Railroad Co. v. Mitchell, 175 Ind. 196, and Evansville, etc., R. Co. v. Scott (Ind. App.), 114 N. E. 649; and Parrill v. Cleveland, etc., R. Co., 23 Ind. App. 654.

(6a) Chicago, etc., R. Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 Am. Dec. 695.

(7) Cooley-Torbe, 72, discussing Morrison v. Davis, 20 Pa. 171. 57 Am. Dec. 695.

(8) 1 Street, Foundations of Legal Liability, 118, discussing Morrison v. Davis, 20 Pa. 171, and Denny v. New York C. R. Co., 13 Gray 481, 74 Am. Dec. 645.

(9) Michigan C. R. Co. v. Burrows, 33 Mich. 6, 14.

sisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole matter in utter uncertainty, for, when once we leave the direct, and go to seeking after remote, causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend more upon conjecture than facts."

In a Texas case[10] where cotton was destroyed by an unprecedented storm, the court held that in order to constitute proximate cause of an injury, the injury must be the natural and probable result of the negligent act or omission. It quotes from another Texas case[11] as follows: "Since every event is the result of a natural law, we apprehend the meaning is that the injury is such as may probably happen as the natural consequence of the negligence under the ordinary operation of natural laws. * * * * It would seem that there is neither a legal nor a moral obligation to guard against what cannot be foreseen." The court then applied the above principles to the case as was shown by the uncontradicted evidence and held that in a legal sense there was not causal connection between the act of negligence and the destruction of the cotton by the act of God.

In a recent Indiana case[12] the suit was for the loss of a piano in the Dayton flood of 1913, the complaint alleged that the piano was a rush shipment and had been fifteen days on its journey, which was one of 163 miles, when it was caught in the flood, and it was claimed that the shipment had been unreasonably delayed and by reason thereof was overtaken by the flood and destroyed.

The lower court gave an instruction which stated that the act of God was not a complete defense if they found that the piano had been unreasonably delayed in shipping and that the delay contributed to the injury.

In reversing the case on account of the giving of such instruction the court states both rules as found in the books and approves the one holding that the act of God completely exonerates the carrier even though there may have been negligent delay, on the ground that the delay is not the proximate cause of the loss. In so holding the court said: "The law holds men responsible for the effects of their acts and omissions within the sphere of human control only. An act of God is the manifestation of a super-human power which breaks the chain of causation in the realm of human activity. It upsets the best-laid plans of men and spoils all their calculations. Because its coming is beyond the scope of man's prevision and its power beyond his strength to resist, he is relieved from the consequences thereof."[13]

In a Kansas case[14] which is a leading one on the subject, a car of corn was delivered to the railroad company on May 22, 1903 at Frankfort, Kansas, for transportation to Kansas City, Missouri, the loaded car stood on the track at Frankfort until May 28th, when it was hauled to its destination and was overtaken there by an unprecedented flood on May 30th, 1903, the delay was protracted through the negligent omission of the company to move the car. There was no question but that the flood was an act of God. There was a finding in favor of

(10) International & G. N. R. Co. v. Bergman (Tex. Civ. App.), 64 S. W. 999.

(11) Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162.

(12) Chicago & E. Ry. Co. v. Schaff Bros. Co. (Ind. App.), 117 N. E. 869.

(13) This decision is not of the Indiana Supreme Court, and is now pending on a petition to transfer, and may be overruled by that court. In the case of Pittsburgh, etc., v. Mitchel, 175 Ind. 196, the Court cites with approval New York cases holding that before the Act of God can be a defense there must be a showing by the carrier that there was no human intervening agency such as delay. See also R. R. Co. v. Scott (Ind. App.), 114 N. E. 649, and Parrill v. Cleveland, etc., R. Co., 23 Ind. App. 654, neither of which are distinguished in the Schaff Bros. case and both of which cite the New York cases.

(14) Rodgers v. Missouri P. R. Co., 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441.

the railroad company in the District Court which was affirmed by the Supreme Court. The following abstracts from the opinion are of interest on the question under discussion. Justice Burch, speaking for the court said: "The maxim is, *In jure, non remota causa sed proxima spectatur.* If a carrier be guilty of negligence not in itself harmful, but wrongful only because of injurious consequences which may follow, and a new cause intervene between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrongdoer would not have anticipated, and but for which the injury would not have happened, the new cause is the proximate cause and the original negligence is disregarded as not affecting the final result. Carriers do not assume the risk of loss caused by the act of God. * * * In the present case there is no causal relation between the negligence charged and the catastrophe which overtook the plaintiff's property. The carrier's delay did not produce the flood, and for all the carrier could foresee, promptitude might have been as dangerous as delay. The delay was a mere incident to the destruction of the car of grain. The *causa causans* was the flood, the inevitableness of which could not be determined by anything which the carrier might do."

In a recent Maine case[14a] the Supreme Court holds that the rule held by the great majority of state courts, that a carrier will be held liable where intervening negligent delay causes goods to be in a place where they are destroyed by an act of God, will not be followed where the shipment comes under the Carmack Amendment, on account of the uniform holding of the Federal Courts to the contrary. It there appeared that by the fault of a connecting carrier, the goods were lost in the Dayton flood of 1913. The fault consisted in the carrier failing to unload the goods promptly on their arrival. Had they been promptly unloaded they would not have been injured. The proximate cause of the loss was held in accordance with federal view to have been the flood and the carrier was exonerated. The court said: "It should not be overlooked that the prime object of the Carmack Amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading and that the principal subject of responsibility embraced by the Act of Congress carried with it necessarily the incidents."

The above quotations are sufficient to illustrate the reasoning followed by the courts relieving the carrier from liability even though there may have been negligent delay in transporting.

The contrary rule which is supported by the very respectable authority, holds that where the carrier has been guilty of negligent delay in transporting or delivering goods entrusted to its care, and thereafter the goods are lost or injured by an Act of God, and but for such delay the goods would not have been exposed to the casualty, the carrier would be liable, and this rule has been held to apply whether the goods are perishable or not.

This rule has been consistently supported by the courts of the state of New York and has been known as the "New York" rule.[15] Besides the courts of New York, this rule has been followed by the courts of about eleven other states.[16]

(14a) Continental Paper Bag Co. v. Maine C. R. (Maine), 99 Atl. 259.

(15) 4 Elliott, Railroads, § 1457a.

(16) McGraw v. Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Wabash R. Co. v. Sharpe, 76 Neb. 424, 107 N. E. 758; Armentrout v. St. Louis, etc., R. Co., 1 Mo. App. 158; Bibb Broom Corn Co. v. Atchison, etc., R. Co., 94 Minn. 269, 102 N. W. 709, 110 Am. St. Rep. 361, 3 Ann. Cas. 450 and note; Hernsheim v. Newport News, etc., Co., 35 S. W. 1115, 18 Ky. Law. 227; Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45; Wald v. Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 53 Am. St. Rep. 332; Lamb v. Mitchell, 15 Ga. App. 759, 137, 84 S. E.

The reason usually assigned in support of the "New York" rule is that, where goods are injured by an act of God while in the possession of a carrier which have been unreasonably delayed, that such default is an active operative cause concurrent with the act of God.

It has also been held that a carrier should foresee, as any reasonable person could foresee, that negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty and would therefore increase the peril that the goods should be lost to the shipper. It is also urged that the meaning of "Act of God" excludes all human agency and that there can be no loss by act of God without the total exclusion of all human agency, and that if there be any admixture of human means an injury cannot be an act of God. Another reason advanced is that the law will not permit anyone to take advantage of his own wrong, and this would be the result if the carrier were exonerated from loss caused by an act of God where there had been negligence on its part.

A few cases contend that negligent delay causing loss through an act of God amounts to a technical deviation and hold the carrier liable under the rules governing that subject.

In a leading New York case,[17] the court said: "The law is well settled that common carriers, while engaged in the transportation of goods for hire, are not responsible for injuries to them caused by an act of God, or the public enemy, with the exception of injuries thus caused, they are liable for all damage to goods intrusted to them, while under their care and control. For the reasons stated in the opinion in the case of Read v. Spaulding (30 N. Y. 630) decided at this term, the carrier, to exempt himself, must show that he was free from fault at the time the injury or damage happened. He must show that he was without fault himself, and that no act or neglect of his concurred in or contributed to the injury. If he has departed from the line of duty, and has violated his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier, is not protected."

In a Minnesota case[18] we find the following language used: "If, but for negligence, the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrong doer should be allowed to apportion or qualify his own wrong; and, if a loss occurs while his wrongful act is in operation and force, and which is attributable thereto he should be liable."

The Supreme Court of Illinois,[19] in a case where it was claimed that fog was an act of God, thus expresses itself: "It is unnecessary to determine whether the existence of the fog could in any event be considered an act of God within the meaning of the law; for, however that question might be determined, it appears from the evidence that the accident would not have happened but for the concurrent negligence of appellant (railroad). Even in a case where the immediate cause of the injury to a passenger is an act of God, the carrier will be liable if its negligence concurred in any degree in causing the injury.

213; Chicago, etc., R. Co. v. Miles, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043; Alabama Great So. R. Co. v. Quarles, 145 Ala. 436, 40 S. Rep. 120, 5 L. R. A. (N. S.) 867; Pittsburgh, etc., R. Co. v. Mitchell, 175 Ind. 196; Evansville, etc., R. Co. v. Scott (Ind. App.), 114 N. E. 658; Parrill v. Cleveland, etc., R. Co., 23 App. 654; Michaels v. New York Central R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

(17) Michaels v. New York Central R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

(18) Bibb Broom Corn Co. v. Atchison, etc., R. Co., 94 Minn. 269, 275, 102 N. W. 709, 110 Am. St. Rep. 361, 69 L. R. A. 509, 3 Ann. Cas. 450.

(19) Sandy v. Lake Street Elevated R. Co., 235 Ill. 194, 85 N. E. 300.

If there is any intervening human agency which contributes to cause the damage, it cannot be considered as caused by an act of God."[20]

In an Indiana case[21] the question was presented whether frost was such an act of God as would relieve the carrier. In deciding the case against the carrier, Mr. Justice Myers said: "But it is claimed that heat and frosts are acts of God. Without stopping to inquire into that question, it is well settled that if there is an intervening human agency, that contributes to the loss, the burden is on the carrier to show that it was prevented from safe delivery by the act of God, and not from delay of negligence in transportation. The complaint alleges that the loss occurred from unreasonable delay in transportation, and the facts disclose that a reasonable time for the carriage was from five to seven days and that nineteen days were consumed in the transportation, and this delay is wholly unaccounted for. If the loss was due to heat or freezing, and they can be said to be acts of God, it was still incumbent upon appellant to show that it was not due to negligence or delay in transporting, or in the language of the cases, an intervening human agency."[22]

In an Alabama case[23] a shipment of cotton was destroyed by a cyclone of great violence after it had been unreasonably delayed in transporting by the carrier. There was a recovery below by the shipper and on appeal the Supreme Court reviews the two conflicting doctrines or rules which it designates as the Pennsylvania rule exonerating the carrier, and the New York rule holding the carrier.

In affirming the judgment the court gives the following quotation from Coggs v. Bernard, Smith Lead. Cas. 319 as stating the true rule: "The true view is not that the carrier discharges his liability by showing an act of God, and is then responsible; as an ordinary agent, for negligence; but that the intervention of negligence breaks the carrier's line of defense, by showing that the injury or loss was not directly caused by the act of God, or, more correctly speaking, was not the act of God."

In a leading Iowa case[24] there was an agreed statement of facts stipulating that the carrier was guilty of negligent delay in the forwarding of the goods of plaintiff, and that said goods were destroyed by a flood which was so unusual and extraordinary as to constitute an act of God and it was further stipulated that, if there had been no such negligent delay, the goods would not have been caught in the flood referred to or damaged thereby.

There was judgment for the defendant below and in reversing the case the higher court said: "Now, while it is true that defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed, and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and

(20) This authority cites 2 Hutchinson on Carriers, § 913, in support of its holdings.

(21) Pittsburgh, etc., v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

(22) There was an attempt to distinguish this case in the opinion in Chicago & E. Ry. Co. v. Schaff Bros. Co. (Ind. App.), 117 N. E. 869, but the fact remains that in numerous other Indiana cases the courts have cited with approval the "Michaels" and "Read" cases of New York. See cases cited under No. 13 above.

(23) Alabama Great So. R. Co. v. Quarles, 145 Ala. 436, 40 So. 120, 117 Am. St. Rep. 54, 5 L. R. A. (N. S.) 867, 8 Ann. Cas. 308.

(24) Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45.

would therefore increase the peril that the goods should be thus lost to the shipper.

This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier, has been held not responsible for the loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation."

The court also advances the argument that in cases such as the one under consideration that there is analogy between such cases and those where there has been a deviation by the carrier, in which cases there has been a uniform holding of liability for loss of freight sustained while on the new route.

The irreconcilable conflict in the authorities is recognized by text writers,[25] and we find among them those following the Pennsylvania rule and urging that it is supported by the weight of authority[26] while others prefer the New York rule and insist that it is suported by the soundest reasoning.

There is no way of reconciling the authorities on this subject as is shown by the review which we have set out, and the writer can only say to his brethren and the courts: Here are the cases and the rules upon which they are based, take your choice.

SUMNER KENNER.

Huntington, Indiana.

(25) 4 R. C. L. 720; 10 Corpus Juris 126; 6 cyc. 383: 1 Thomp. Neg., § 74.

(26) Schouler, Bailments, 1905 ed., § 348; Hale, Bailments & Carriers, 361; 6 Cyc. 382; Notes in 36 Am. St. Rep. 838.

LARCENY—RECENT POSSESSION.

STATE v. FORD et al.

Supreme Court of North Carolina. March 13, 1918.

95 S. E. 154.

The presumption of guilt of one in recent possession of stolen goods, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent, and as the other evidence tends to show it to be exclusive, but possession is not limited to custody about the person, but the property may be deposited in some place under lock and key where it is manifest it must have been put by the act of the party or his undoubted concurrence, but it is also imperative that the doctrine be kept within proper limits on account of the temptation to shift evidence of guilt from one to another.

ALLEN, J. The doctrine of recent possession, as applied in the trial of indictments for larceny, frequently leads to the detection of a thief, when without it the guilty would go free, but the temptation to shift evidences of guilt from one to another, and the ease with which stolen property may be left on the premises of an innocent person, make it imperative that the doctrine be kept within proper limits, and as Lord Hale says in his Pleas of the Crown, vol. 2, p. 289, "it must be very warily pressed." Gaston J., says in State v. Smith, 24 N. C. 406, while discussing a charge to the jury that recent possession of stolen property raised a presumption of guilt:

"From necessity, the law must admit, in criminal as well as civil cases, presumptive evidence; but in criminal cases, it never allows to such evidence any technical or artificial operation, beyond its natural tendency to produce belief under the circumstances of the case. Presumptions of this kind are derived altogether by means of experience from the course of nature and the habits of society, and when they are termed legal presumptions, it is because they have been so frequently drawn under the sanction of legal tribunals that they may be viewed as authorized presumptions. Among these is that which was in the mind of His Honor, the recent possession of stolen goods, in the case of larceny, raising the presumption of an actual taking by the possessor. But when we examine the cases, in which such a presumption has been sanctioned, or consider the grounds of reason and experience on which the presumption is clearly warranted, we shall find that it applies only when this possession is of a kind which manifests that the stolen goods have come to the possessor by his own act, or, at all events, with his undoubted concurrence."

In the Smith case tobacco was stolen Friday night, and was found Saturday morning in a barn on the land of Smith and within 100 or 200 yards of his dwelling, and it was held error to charge that these facts raised a strong presumption of guilt, and the court lays no stress on the use of the word "strong" in the instruction, and deals only with the question whether the facts raised a presumption against the defendant. In State v. Graves, 72 N. C. 485, Pearson, C. J., says that the presumption does not arise except when "the fact of guilt must be self-evident from the bare fact of stolen goods," and Hoke, J., in State v. Anderson, 162 N. C. 576, 77 S. E. 238, that it is only when "he could not have reasonably gotten possession unless he had stolen them himself."

The principle is usually applied to possession which involves custody about the person, but it is not necessarily so limited. "It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn, when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence." State v. Johnson, 60 N. C. 237, 86 Am. Dec. 434. The presumption, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent, and as the other evidence tends to show it to be exclusive. State v. Rights, 82 N. C. 675; State v. Record, 151 N. C. 697, 65 S. E. 1010, 25 L. R. A. (N. S.) 561.

Applying these principles, we are of opinion there is evidence to be submitted to the jury as against the defendant Ford, but that there is error in the charge.

His Honor charged the jury that the law presumed that the defendant had stolen the property, or was criminally connected with the theft, if he had control and management of the business, and was in the control and dominion of the warehouse, making his guilt depend on two facts that were not in controversy, and he failed to instruct the jury that this presumption could not, however, arise unless this control, management, or dominion was exclusive, or unless the jury was satisfied beyond a reasonable doubt that the goods were placed in the warehouse "by the act of the party or his undoubted concurrence." State v. Johnson, supra. The distinction is important and material. There are thousands of barns, stables, outhouses, warehouses and chicken houses in this state under the control, management and dominion of the owner, many of them open and easy of access, in which stolen property may be secreted without the knowledge or concurrence of the owner, and it is going far enough to permit possession under these conditions to be considered as a circumstance, without giving it the additional weight of a presumption raised by law, which is equivalent to saying to the jury that the experience and observation of those who have been administering the law for hundreds of years is that the owner of the premises is the thief.

In this case the defendant Ford, who is shown to be a man of good character, testified, without objection and without contradiction, that Davenport, who, with one other not identified, stole the goods from the warehouse at Whitehurst, told him that they intended to carry the goods to Edgecombe county, but when they got to Bethel day was breaking, and they had to put them somewhere, or be caught with them, and as he knew about the warehouse he went around and drew the staple and put them in there. This is not an unreasonable statement, because it must be remembered that the goods were stolen on Saturday night and placed in the warehouse early Sunday morning, and it might be reasonably expected by the thieves that the warehouse would not be used on Sunday, and that the goods would not be discovered before they could remove them on Sunday night.

New trial as to defendant Ford.

NOTE.—*Possession of Property Recently Stolen as Presumption of Law or Fact.*—It appears from the instant case that the court below, in effect, instructed the jury that the possession of property recently stolen was a presumption of law, but this presumption was not irrebuttable. This instruction was held error. In prior decision in North Carolina it has been said that "a prisoner found in possession of stolen goods so soon after the theft that he could not reasonably have gotten the possession unless he had stolen them himself, is *presumed in law to be the thief.*" State v. Graves, 72 N. C. 482. And in State v. Record, 151 N. C. 697, 65 S. E. 1010, 25 L. R. A. (N. S.) 561, it was said: "Possession of stolen goods immediately after the theft raises a *violent presumption*" of guilt of the possessor. This seems as objectionable as indicating a rule for instruction to a jury as the older expression. When the instant case says: "The presumption, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent and as the other evidence tends to show it to be exclusive," we do not get away entirely from the theory of presumption of law as distinguished from presumption of fact. For the presumption of fact to be qualified as stronger or weaker is, or ought to be, wholly a jury question, admitting, however, that a court may take into account admissibility of evidence of possession as being remote or otherwise. But this gate having been passed the question of weight is for the jury.

In Dodson v. State, 86 Ala. 60, 5 So. 485, there was an instruction that: "The recent possession of stolen property is *prima facie* of guilt of the offense of larceny." Then the instruction distinguished as to burglary for which defendant was on trial by saying the jury must be convinced beyond a reasonable doubt that he broke and entered, etc. The Supreme Court thought that "as matter of law" the guilt of burglary was not thereby shown, but in such a charge this possession was only evidence in the charge of burglary. This distinguishing seems to be inaccurate. The instruction as declaring there was *prima facie* evidence of larceny made proof of burglary depend on a presumption, which was treated as one of law and not one of fact.

In People v. Boxer, 137 Cal. 562, 70 Pac. 671, an instruction telling the jury that: "To justify the inference of guilt from the fact of possession of stolen property," etc., etc., this was held to be misleading as an instruction, because the court could not tell the jury that a presumption of guilt could arise out of any state of facts, as a matter of law.

The Florida Supreme Court expresses itself, it seems to us, more accurately that guilt of an accused does not follow as a presumption of law from unexplained possession of goods recently stolen. Rimes v. State, 36 Fla. 18, So. 114.

In State v. Brady, 121 Iowa 561, 91 N. W. 801, it was said: "The law does not attach a presumption of guilt to any given circumstance, nor does it require the accused to overcome the presumption thereby raised, in order to be entitled to an acquittal."

In Johnson v. Territory, 5 Okla. 695, 50 Pac. 90, it was thought that no presumption of law could arise from any proof of possession of stolen goods, because it was for the jury to determine whether as a fact accused had been proven guilty.

As showing that possession of stolen property is nothing more than a circumstance, admissible as not being remote in Com. v. Coyne, Mass., 117 N. E. 337, it was said in speaking of evidence of the possession of property of considerable value that: "It's weight may be trivial or cogent according to other conditions shown. It might be slight against a person of affluence and of extravagant habits. It might be of importance against one of small estate or of no visible means of support."

In State v. Littleton, W. Va., 88 S. E. 458, the lower court instructed the jury that: "The possession of property proven to have been recently stolen is evidence from which the jury may infer that the person in whose possession or constructive possession, such property is found is guilty of the theft, provided that such possession is unexplained." This was a burglary case and the instruction was held error, because as the court said: "It is now well settled in this state that possession of stolen goods is not of itself *prima facie* evidence that the person in possession is the thief, but finding such goods recently after the offense is committed, in the exclusive possession and control of the accused, is a circumstance which may be submited to a jury with other evidence." See also State v. Reece, 27 W. Va. 375.

We think, that everything in the way of fact of possession of stolen property is a mere fact which a jury is to take and draw such inference therefrom as they see fit, whether that possession be of property recently stolen or not and whether such possession is explained or unexplained or attempted to be explained. There seems to be no reason in singling this kind of fact out and attaching to it, in a criminal case, at least, any presumption at all. It, like other facts, may be admissible, as having, according to judicial cognizance, a tendency to establish the main fact involved, but the directness or otherwise of that tendency is purely a question of fact.

C.

## ITEMS OF PROFESSIONAL INTEREST.

### Camp Johnston Bar Association.

So many lawyers have volunteered or been drafted into the army that we are not surprised at the organization of a new Bar Association at Camp Joseph E. Johnston, Fla. Lawyers are so accustomed to meeting together that such an association must be highly gratifying to lawyers in the army. This new association, of which G. S. Moore, of Nashville, Tenn., is president, is said to be the first of its kind.

### New Attorney General for Minnesota.

Attorney General Lyndon A. Smith, of Minnesota, died March 5th, and as his successor Gov. Burnquist recently appointed Clifford L. Hilton, of St. Paul.

### New Convert to the Torrens System.

The propaganda for the Torrens System of land registration has made a new convert. Georgia is the latest state to adopt this system. William E. Arnaud, of Atlanta, has been appointed county examiner by the judges of the Superior Court of Fulton county, Georgia. Mr. Arnaud has made a careful study of the subject and has contributed many articles explaining the working and benefits of the new system.

### Law Writer Dies.

A noted legal author, William Lawrence Clark, of Brooklyn, died March 2nd, aged 54 years. Mr. Clark was known principally for his law writings. He was an indefatigable worker, his legal works covering a very wide range of subjects, including Contracts, Corporations and Criminal Law. He contributed many articles to the law cyclopedias and was one of the editors of the Edward Thompson publications.

### Bar Association Referendum.

The American Bar Association recently announced the result of the referendum of the

question of increasing the salaries of federal judges, submitted to its members last December. The result was 4005 votes in the affirmative and 692 in the negative.

**Dr. Collier Becomes a University President.**

Dr. William Miller Collier, author of Cyc and editor of American Bankruptcy Reports, has just been elected President of the George Washington University, Washington, D. C., to succeed Rear Admiral Stockton, U. S. N., retired, who presented his resignation to take effect August 31st next. Dr. Collier, in addition to his work as a legal author, has served for several years as Civil Service Commissioner of the State of New York. In 1905 he was minister plenipotentiary to Spain.

## CORRESPONDENCE

### GUARD-RAILS ON BRIDGES—NECESSITY AND CONVENIENCE.

*Editor Central Law Journal:*

We have read with considerable interest, Mr. Cooper's paper on Guard-Rails on Bridges, 85 Cent. L. J. 279, but think his conclusions in the matter mistaken, as are also the conclusions of the courts cited by him.

We take issue with these conclusions on the ground that what were ordinary contingencies thirty years ago, before the use of the automobile became common, are not ordinary contingencies to-day, and that any protection against accidents, in the construction of bridges at the present time, should cover such possibilities of accident as occurred in the cases named in Mr. Cooper's article. Of course, if the purpose of a guard-rail—which in such a case would be a misnomer—is intended simply to give notice of danger, and not for protection, then, it would seem to us, a recovery for damages would be impossible in any case.

J. H. ROCKWELL.

Springfield, Illinois.

NOTE—We publish this without particular comment on the interesting question treated in the article referred to. Of course, a guard-rail—its necessity and convenience—should be deemed sufficient or not according to prevailing customs and modes of travel across bridges. If a guard-rail might be deemed sufficient as to horse-drawn vehicles, it might not as to automobiles, or vice versa. These are questions for practical consideration by highway authorities.—Editor.

## HUMOR OF THE LAW.

Executor: See here. If I list my late father's estate as bigger than it is they'll jump me for an income tax and if I make it smaller than it is the bank will call my loans.

Lawyer: Why not make it exactly true?

Executor: By jove! I never thought of that.

"Dot boy of mine is going to make a goot business man," said Mr. Beckstein. "Yesterday I told him I was going to leave all my broberty to him ven I died, und vat you s'pose he say to dot?"

"I don't know, Mr. Beckstein."

"Vell, he say he vill throw off five per cent for sbot cash."

"What's this?" asked the acquitted man.

"The bill for my service," said the lawyer.

"Go on! You proved that I was insane, didn't you?"

"Yes."

"Well, you can't do business with an insane man. You ought to know that."—St. Louis Star.

Gas attacks are not to be feared by soldiers at the front only. In Chicago, in the course of the second Liberty Loan drive, for instance:

A. Happer, a Liberty Bond salesman, went into a dentist's office, where a big man lay inert in the operating chair. The dentist was working over the patient feverishly.

"What's the—" began Happer.

"Can't get him out—can't get him out of it," gasped the dentist. "Gas, you know—gas. He won't come out of it. Here, lend a hand and help bring him to. Take his arms—this way. Come on!"

"Right-o!" cried Happer. "But if I bring him out, will you buy a Liberty Bond?"

The dentist would have promised to do much more than that. In a minute the patient began to show signs of life. He gasped, shivered, and, at last, sat up.

"Where am I?" asked the patient.

"Excuse us," said Happer. "We just waked you up to sell you a Liberty Bond."

Twenty minutes later Happer left the office with two signed applications and two checks in his pocket.

"Everybody who isn't unconscious is buying a Liberty Bond," said Happer, when he related the story.—National Corporation Reporter.

## WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.*



1. Adverse Possession — Adverse Claim. — Where defendant based his claim to land in adjoining section upon his purchase from adverse holder, held that, though parcel on which his improvements were placed extended into adjoining section, his previous claim to land in that section did not prevent submission of claim to 160 acres in other section on ground of incompatibility of claims.—Gallup v. Creal, U. S. C. C. A., 247 Fed. 312.

2.——Evidence.—In ejectment, defended on the ground that defendants had acquired title by adverse possession of the deceased husband of one defendant, evidence that his widow sought to borrow money to pay the taxes, accompanied by the declaration that she owned the premises, was properly excluded, since she stood on the title perfected by her husband.—Pope v. Hogan, Vt., 102 Atl. 937.

3.——Statute of Limitations.—Landlord, on renewal of annual lease, comes constructively into possession, and hence, though property was in possession of tenant during period of plaintiff's adverse user of the water tunnel he had built on the land to carry water to his adjoining land, yet where lease was annually renewed limitations run against landlord.—Gartlan v. C. A. Hooper & Co., Cal., 170 Pac. 1115.

4. **Assault and Battery**—Evidence.—Seizing of saddle bags lying on ground and examination of same in presence of owner and over his protest is not an "assault."—Manning v. Roberts, Ky., 200 S. W. 937.

5.——Deadly Weapon.—Drawing of pistol accompanied by threat, evidencing intention to use it, held an assault, though offender was prevented from presenting the pistol in the attitude of firing it.—Johnson v. State, Ark., 200 S. W. 982.

6. **Attorney and Client**—Compensation.—Rule that attorney may only recover reasonable sum for services notwithstanding attempted fixing of value by contract after relation commenced, held applicable only when there are special reasons for its application.—Countryman v. California Trona Co., Cal., 170 Pac. 1069.

7.——Compensation.—Where Special Term on motion, made order fixing attorney's compensation for services in action for death, remedy of guardian of intestate's children was not by independent motion to vacate order, but by direct appeal.—In re Atterbury, N. Y., 118 N. E. 858.

8.——Estoppel.—Statement of attorney for administratrix that he thought she would pay claim when she got the money held not to bind her or estop her from pleading limitations against the claim.—Butler v. Fechner, Tex., 200 S. W. 1126.

9.——Suspension.—Under Code Civ. Proc., § 287, subd. 2, district attorney who hampered administration of criminal law by endeavoring to secure provision for prosecutrix and child rather than to convict one charged with rape, and also used abusive language regarding judge of superior court, held to be suspended from practice for year for such violations of his duty, under § 282, subds. 1, 2.—In re McCowan, Cal., 170 Pac. 1100.

10. **Automobile**—Pedestrian's Negligence.—If plaintiff jumped from moving street car in front of passing automobile, he cannot recover for injuries so received.—Horowitz v. Gottwalt, N. J., 102 Atl. 930.

11. **Bankruptcy** — Anticipatory Breach. — While adjudication in bankruptcy creates anticipatory breach of bankrupt's contracts, it does not make agreement to pay out of uncertain fund, which may never come into being, fixed liability which can be proven under Bankr. Act, § 63.—In re 35% Automobile Supply Co., U. S. D. C., 247 Fed. 377.

12.——Discharge.—Where school teacher prepared for assetless bankruptcy to avoid payment for expensive fur coat, held, that her omission from schedules of salary due at time they were verified will preclude discharge.—In re Garrity, U. S. C. C. A., 247 Fed. 310.

13.——Involuntary Petition.—Though involuntary petition in bankruptcy against corporation did not allege act of bankruptcy, yet, where it was in fact insolvent, it may by resolution confess its insolvency and inability to pay its debts and declare its willingness to be adjudicated bankrupt on that ground, and, if that be done, new petition can be filed.—In re D. F. Herlehy Co., U. S. C. C. A., 247 Fed. 369.

14.——Jurisdiction.—In a proceeding against a partnership, although no adjudication is made against the partners, they and their estates are brought within the jurisdiction of the court, which may on their application discharge them from further liability for the partnership debts.

—Armstrong v. Norris, U. S. C. C. A., 247 Fed. 253.

15.——Judgment Lien.—Under Bankr. Act, § 3a, subd. 3, where judgment creditor delays more than four months in advertising or directing sale under execution, no act of bankruptcy is committed, though judgment lien then becomes invulnerable to attack under act.—In re D. F. Herlehy Co., U. S. C. C. A., 247 Fed. 369.

16. **Banks and Banking**—Charging Back.—Deposit of draft or check in ordinary course of business, depositor receiving credit against which he can draw, held a sale, transferring title, and the bank cannot charge back the amount in case of dishonor.—First Nat. Bank v. Stengel, N. Y., 169 N. Y. S. 217.

17.——Holder in Due Course.—The payee of a note is not a "holder in due course," within the meaning of Negotiable Instrument Law (Rev. St. 1909, § 10022), and the note in his hands is subject to the same defenses as if it were non-negotiable.—Long v. Mason, Mo., 200 S. W. 1062.

18.——Notice.—That bank officials knew that one signing a note as a director did not mean to be personally liable is not a defense, in an action by the bank on the note.—Nimnich v. Bank of Corning, Ark., 200 S. W. 992.

19.——Print and Writing.—In note containing printed words "pay to the order of" immediately before name of payee, and the written word "only" immediately after his name, the written word prevails over printed words, and note is non-negotiable.—First Nat. Bank of Sidney v. Greenlee, Neb., 166 N. W. 559.

20.——Waiver.—Under Act No. 64 of 1904, §§ 109-111, a waiver of protest written on the face of a negotiable note before it is indorsed is deemed to be a waiver by the indorser not only of a formal protest, but also of presentment and notice of dishonor.—Frank-Taylor-Kendrick Co. v. Voissement, La., 77 So. 895.

21. **Brokers**—Breach of Duty. — Action of stockbrokers in taking over for their own account stocks carried on margin for customer held breach of duty owing customer, damages being same whether it was sale or conversion, and sales made by brokers to themselves, though at market value, were voidable by customer at his election.—Hall v. Paine, Mass., 118 N. E. 864.

22. **Carriers of Goods**—Carmack Amendment.—The Carmack Amendment does not affect the common law rule that when a carrier of goods relies upon one of the excepted causes of damages as a defense, in action by the shipper, it must establish that damages proximately resulted therefrom.—Haglin-Stahr Co. v. Montpelier & W. R. R. Co., Vt., 102 Atl. 940.

23.——Connecting Carrier.—A connecting carrier is liable on the bill of lading of receiving carrier for damages done to goods while being shipped on its lines.—Emil Grossman Mfg. Co. v. New York Cent. R. Co., N. Y., 169 N. Y. S. 213.

24.——Seizure by Process.—A carrier will be protected against a shipper or consignee, if property has been seized or taken from its possession by attachment, replevin, or search warrant at instance of a third person.—Atchison, T. & S. F. Ry. Co. v. International Land & Investment Co., U. S. C. C. A., 247 Fed. 265.

25. **Carriers of Passengers**—Alighting.—Rule of street railway requiring conductors to go forward and look for approaching train before signaling ahead would not excuse conductor from first discharging duty to alighting passenger, and his negligence would render company liable for injury.—Cain v. Kanawha Traction & Electric Co., W. Va., 95 S. E. 88.

26.——Evidence.—In action against street railway for injuries at station, testimony that it would have been good engineering to have used movable platform under conditions at particular place of injury was competent.—Harrington v. Boston Elevated Ry. Co., Mass., 118 N. E. 880.

27. **Chattel Mortgages**—Attesting Witnesses.—That signature of one of attesting witnesses to chattel mortgage was forged is immaterial; such witnesses not being necessary to validity of mortgage between parties.—Chase v. Cable Co., Okla., 170 Pac. 1172.

28.——Estoppel.—That transferee of chattel mortgage authorizing mortgagee to collect as its trustee knew cotton received from mortgagors would be placed with factors for storage or sale, held not to estop it from asserting its rights.—Baker, Lyons & Co. v. American Agricultural Chemical Co., Ala., 77 So. 866.

29.——Renewal.—A renewal of chattel mortgage, by executing new mortgage and discharging old mortgage of record, merely continues lien, and renewed mortgage is superior to chattel mortgage executed before renewal, but subsequent to original mortgage.—First State Bank of Saltillo v. Ennis Title Co., Tex., 200 S. W. 1122.

30. **Commerce**—Employe.—A fireman on an interstate train assisting other employes in repairing a water spout at a tank where his engine must then take water, was within his duties, and an injury while so engaged comes under the federal Liability Act.—Texas & P. Ry. Co. v. Williams, Tex., 200 S. W. 1149.

31.——Interstate Business.—Maine corporation pursuant to contract with city of Boston furnished fire alarm lamps, boulevard lanterns, etc., and gas used, transacted local and domestic and not interstate business.—Parker v. Rising Sun Street Lighting Co., Mass., 118 N. E. 871.

32. **Constitutional Law**—Delegation of Authority.—Selective Service Act, May 18, 1917, § 13, making it offense to maintain houses of ill fame within such zone as may be prescribed by Secretary of War, is not invalid as delegating legislative authority to executive officer.—United States v. Casey, U. S. D. C., 247 Fed. 362.

33.——Due Process of Law.—Acts 1907, c. 32 (Thomp. Shan. Code, § 2853a2 et seq.), requiring registration and license fee of $3 in order to keep a female dog, does not contravene Const. art. 1, § 8, providing that property shall not be taken without a judgment of peers of the land, or without compensation.—State v. Erwin, Tenn., 200 S. W. 973.

34.——Elections.—Failure of Laws 1917, c. 815, to provide for voting by soldiers and sailors on liquor tax question, held not to require resubmission, as, under Const. art. 2, § 1, they had a right to vote, irrespective of legislative action.—In re Zierbel, N. Y., 169 N. Y. S. 270.

35.——Principal and Surety.—Code Civ. Proc. § 1183, providing that no modification of build-

ing contract between owner and contractor shall relieve any surety on bond, is not unconstitutional, in that it is impossible for the owner, contractor and surety to enter into a contract, the obligation of which is definitely established in advance.—Hubbard v. Jurian, Cal., 170 Pac. 1093.

36. **Contracts**—Lien for Advances.—Under a contract for advances between bank and owner of a brick plant and its lessee, held, that brick released and sold were not subject to lien for subsequent monthly advances made to lessee; contract providing for monthly settlements.—Bank of Ragland v. Hudson, U. S. C. C. A., 247 Fed. 241.

37.——Pledge.—Where C, who had purchased and agreed to carry stock for S's account, pledged it, together with other stock owned by C, to pledgee without notice, held equity would compel C's stock and the sum to be paid by S for stock to be first applied to payment of C's note.—Clayton v. Smith, N. D., 102 Atl. 925.

38.——Waiver.—Where there was no agreement by stockholder and creditor of corporation that he would waive his rights as creditor, if others would take over portion of his stock, there was no promise by him for benefit of third person with those taking portion of his stock could assert on behalf of corporation, despite stockholders' agreement with corporation as to payment.—In re 35% Automobile Supply Co., U. S. C. C. A., 247 Fed. 377.

39. **Corporations**—Mortgage. — Mortgages of assigned patent rights by corporation were not void because it may be inferred that the president and hence the corporation knew installment payment to assignor would not be paid.—Feaster v. Feaster Film Feed Co., Mass., 118 N. E. 912.

40.——Organization.—To effectuate corporate organization, act under which it is organized need provide neither for amendment of articles, nor that on compliance with it organization shall be corporation.—Superior Lodge, Degree of Honor v. Van Camp, S. D., 166 N. W. 545.

41.——Presumption.—In action against Maine corporation by collector of city of Boston to collect taxes on personal property, company doing business in state, it may be presumed that it has complied with provisions of statutes as to appointment of agents for service of process and otherwise.—Parker v. Rising Sun Street Lighting Co., Mass., 118 N. E. 871.

42. **Damages**—Evidence.—In action for personal injury while engaged temporarily in pushing loaded cars from pit mouth to checkhouse, at $2 per day, plaintiff's testimony that he was skilled miner able to earn greater wages when opportunity offered was admissible.—Clark v. Butler Junction Coal Co., Pa., 102 Atl. 952.

43.——Lessening Damages.—Where plaintiff's sub-lessee, in breach of a contract, suspended pumping operations immediately on giving notice of intention to cancel lease at expiration of 80 days, held that, though plaintiff's lease was forfeited for failure to operate pumps, plaintiff could not recover value of its lease, for that was consequential damage, which might have been avoided by relatively trifling expenditure.—Bear Cat Mining Co. v. Grasselli Chemical Co., U. S. C. C. A., 247 Fed. 286.

44.——Nominal.—Although a landowner is entitled to water at a certain rate, he cannot stand by and recover more than nominal damages for loss of crops and trees from lack of water because the defendant refuses to furnish water at such rate.—Henrici v. South Feather Land & Water Co., Cal., 170 Pac. 1135.

45.——Punitive.—In action for damages to property by railroad's blasting operations in quarry, answering affirmatively special issue whether the operations were done willfully, etc., would have permitted an award of punitive damages, but did not require it, but negative answer precluded such award.—Cobb v. Atlantic Coast Line Ry. Co., N. C., 95 S. E. 92.

46.——Special Damages.—Although petition did not allege in terms that charges for medical, hospital, and traveling expenses were reasonable, it was sufficient to authorize finding of special damages, where it alleged that it was necessary for plaintiff to incur such expenses.—Louisville & I. R. Co. v. Frazee, Ky., 200 S. W. 948.

47. **Deeds**—Recording.—Where grantor who was dissatisfied with unrecorded deed obtained possession thereof, made certain changes, and redated it to correspond with date of its new execution, effect of deed was same as if it had originally been dated as of date of new execution.—Jeffrey v. Langston, Ky., 200 S. W. 917.

48. **Divorce**—Physical Violence.—Under divorce statute, Rev. Laws, c. 162, § 1, wife's libel for divorce, alleging cruel and abusive treatment, was properly dismissed, where there was no evidence of physical violence, and libelant's illness was caused solely by alienation of husband's affections.—Armstrong v. Armstrong, Mass., 118 N. E. 916.

49. **Electricity**—Volunteer.—Damages are recoverable for death of one who, in voluntary effort to protect others, was killed while attempting to remove charged electric wire dangling in public street as result of telephone company's negligence, if he took reasonable precautions to protect himself.—Workman v. Lincoln Telephone & Telegraph Co., Neb., 166 N. W. 550.

50. **Estoppel**—Insolvent Corporation.—Claimant, stockholder and creditor of corporation, held not estopped, as against those who acquired his stock in corporation, from asserting his claim against it, despite agreement that he should be paid out of earnings, where corporation was so insolvent that stockholders would get nothing in any event.—In re 35% Automobile Supply Co., U. S. D. C., 247 Fed. 377.

51. **Executors and Administrators**—Collections.—Collection by administrator de bonis non with will annexed, of fund over which general power of appointment was given testator by his mother, and conversion of fund into cash, was not collection of "new assets" within Rev. Laws, c. 141, §§ 11, 18, as to extension of time for creditors' actions against administrators by receipt of "new assets," etc.—Shattuck v. Burrage, Mass., 118 N. E. 889.

52.——Presumption.—Where mother-in-law of deceased resided with him and her daughter, rendering household services, it will be presumed that such services were rendered gratuitously, and to recover there must be proof of express contract or of facts and circumstances

for which contract for compensation can be implied.—Zuhn v. Horst, Wash., 170 Pac. 1033.

53. **Food**—Imitations.—Where oleomargarine colored in imitation of butter is sold in Illinois, and delivered by the seller to the purchaser in Missouri, the seller is not liable to a prosecution for keeping colored oleomargarine for sale in violation of Rev. St. 1909, § 651.—State v. Swift & Co., Mo., 200 S. W. 1066.

54. **Fraud**—Laches.—Where vendors positively represented that tract contained specified acreage and purchaser did not ascertain shortage for over four years until he moved on the land and started to clear it, delay in suing for the fraud held not laches.—Stone v. Burns, Tex., 200 S. W. 1121.

55. **Fraudulent Conveyances**—Intent. — In creditors' suit wherein defendant's title to Kansas land, consideration for which was paid by her husband, was attacked, evidence held insufficient to show that husband caused title to land to be conveyed to defendant wife with actual intent to hinder, delay or defraud present or subsequent creditors.—Anderson v. Hultberg, U. S. C. C. A., 247 Fed. 273.

56. **Gifts**—Evidence.—A gift whereby the estate of a decedent is depleted, if not in writing, should be proved by disinterested witnesses, and the evidence must be definite, clear and convincing.—In re Housman's Estate, N. Y., 169 N. Y. S. 277.

57.——Intent.—Where owner of bank deposits caused them to be put in names of herself and niece, and gave deposit books to niece on latter's promise to return them, there being no intention to make gift, as between owner and niece, money belonged to former.—Bradford v. Eastman, Mass., 118 N. E. 879.

58.——Intent in Delivery.—Delivery of certificate of stock, with intention of making gift of shares evidenced thereby, is ordinarily treated as valid, completed gift and courts will enforce transfer in suit in equity.—In re 35% Automobile Supply Co., U. S. D. C., 247 Fed. 377.

59. **Habeas Corpus**—Appeal and Error. — Where defendant contended that he could not be convicted of felony for his theft of motor car, but only of misdemeanor, he is entitled to obtain relief from conviction of felony by appeal, and not by habeas corpus.—Ex parte Jackson, Tex., 200 S. W. 1092.

60. **Indictment and Information**—Synonymous Terms.—Terms "house of ill fame," "bawdy house," and "brothel" being synonymous, indictment charging keeping of all three resorts charges but one offense.—United States v. Casey, U. S. D. C., 247 Fed. 362.

61. **Insurance**—Burden of Proof. — Where complaint alleged defendant insurer's refusal to accept premiums unless insurer consented to unlawful lien being placed upon policy, it was unnecessary to allege or prove offer on insured's part to perform contract.—Federal Life Ins. Co. v. Weedon, Ind., 118 N. E. 842.

62.——Indemnity Policy.—Under policy indemnifying plaintiff, held, defendant was not liable for damages paid by plaintiff to elevator passenger injured while elevator was being operated by employe under age fixed by law, and contrary to provision of policy, although accident was due to structural defect.—Fidelity & Casualty Co. of New York v. Palmer Hotel Co., Ky., 200 S. W. 923.

63.——Iron Safe Clause.—That insured did not comply with iron safe clause of fire policy, etc., is no defense to action for premium on renewal policy.—Security Loan & Investment Co. v. Etheredge, S. C., 95 S. E. 109.

64.——Statutory Construction.—Under Comp. Laws 1913, § 6548, breach of a provision making policy void if insured, without insurer's indorsement and consent, obtains other insurance, does not make policy void, but voidable only.—Yusko v. Middlewest Fire Ins. Co. of Valley City, N. D., N. D., 166 N. W. 539.

65. **Landlord and Tenant**—Sublease.—Instrument held sufficient as a sublease, though informal in character, not using the words "let" or "demise," and not describing the property by reference to a map, or in any usual manner.—Baranov v. Scudder, Cal., 170 Pac. 1122.

66. **Libel and Slander**—Importing Felony. — Words that clearly and unequivocally import that the person accused is guilty of some felony or other crime of such turpitude as to render him liable upon indictment to some infamous punishment are actionable per se.—York v. Mims, Ky., 200 S. W. 918.

67. **Master and Servant**—Course of Employment.—Where intestate was injured while working on employer's barn under its orders and control and for its benefit, he was injured in course of his employment.—Southwestern Surety Ins. Co. v. Curtis, Tex., 200 S. W. 1162.

68.——Insanity.—Insane person incarcerated in jail cell with another was liable civilly for his assault with knife upon his cell mate.—Kusah v. McCorkle, Wash., 170 Pac. 1023.

69.——Interstate Employment.—Servants of interstate carrier while engaged in interstate commerce assumes all the ordinary risk of his employment which are known, or which could have been known by the exercise of ordinary care.—Chicago, R. I. & P. Ry. Co. v. Hessenflow, Okla., 170 Pac. 1161.

70.——Partial Loss.—Where an employe lost the lens of an eye, but could see by use of an artificial lens, if he did not use the good eye at the same time, and could continue his work without loss in wages, there was no "loss of an eye," nor "loss of use of an eye," within Workmen's Compensation Law, § 15, subd. 3.—Frings v. Pierce-Arrow Motorcar Co., N. Y., 169 N. Y. S. 309.

71.——Respondeat Superior.—Where employe of defendant school district whose duty it was to deliver parcels on defendant's motorcycle took such motorcycle after working hours without permission and contrary to rules of school board for his own convenience, defendant was not liable for injuries to plaintiff from resulting collision.—Babbitt v. Seattle School Dist. No. 1, 170 Pac. 1020.

72.——Respondeat Superior.—Where defendant allowed son-in-law, who was member of his family to drive his motorcar a few blocks as an accommodation, the son-in-law cannot be deemed agent of defendant; it appearing that defendant merely granted permission to use his car.—Bolman v. Bullene, Mo., 208 S. W. 1068.

73.——Volunteer.—If servant of products company was not a volunteer when killed by fall of derrick constructed to clean gas well, and if he was without knowledge of change of employers, and was working for defendant, it would be liable, though well was owned by another company.—Brown v. Kittanning Clay Products Co., Pa., 102 Atl. 948.

74.——Warning.—Where inexperienced laborer is employed to dig trench, without instruction or warning, master's failure to shore walls to prevent caving, as is customary and reasonably necessary to do, and to furnish material therefor, renders him liable.—Moore v. Village of Naponee, Neb., 166 N. W. 548.

75.——Workmen's Compensation Law.—Where claimant, losing right eye prior to amendment of workmen's Compensation Law, § 15, subd. 6, by Laws 1915, c. 615, had previously injured left eye, so that it was useless, he was entitled to award for permanent total disability.—Kriegbaum v. Buffalo Wire Works Co., N. Y., 169 N. Y. S. 307.

76.——Workmen's Compensation Act.—Employe, who, whenever employer secured contract for installation of machinery, was required to go to the place for assembling same, was a "traveling employe," entitled to compensation under Workmen's Compensation Act for injuries on public highway while traveling in course of employment in automobile.—London & Lancashire Indemnity Co. v. Industrial Accident Commission, Cal., 170 Pac. 1074.

77. **Mechanics' Liens**—Intervening Petition.—Filing of an intervening petition, in action by owner to ascertain mechanics' liens, within 30 days after completion of a building, does not give a materialman or worker a lien when no valid notice of claim has been served, under Thom. Shan. Code, § 3540.—Bird Bros. v. Southern Surety Co., Tenn., 200 S. W. 978.

78. **Municipal Corporations**—De Facto Officer.—Where one selected by board of aldermen of municipality as mayor entered into discharge of duties of such office, he was at least de facto officer, whose right to act could be questioned only by direct proceedings, and hence his right to vote in case of tie, in vote for city attorney cannot be drawn into question collaterally.—Markham v. Simpson, N. C., 95 S. E. 106.

79.——Ordinance.—Under Baltimore Charter, § 6, any city ordinance, commissioner of street cleaning held to remove ashes and household refuse for the city in its private capacity, and hence it was liable for failure to require such removal as required by ordinance.—Consolidated Apartment House Co. v. City of Baltimore, Md., 102 Atl. 920.

80. **Names**—Variance.—That name of owner of stolen calf was J. L. P. and not J. R. P., as alleged, was not material variance.—Phillips v. State, Tex., 200 S. W. 1091.

81. **Navigable Water** — Submerged Land.—Lowlands covered with blackthorn, cottonwood, maple, and honey locust, with an undergrowth of vines and briars, are not a part of the lake on which they border, although submerged part of the year.—State v. Parker, Ark., 200 S. W. 1014.

82. **Parent and Child** — Emancipation.—If claimant of cotton levied on under execution against his father was emancipated at 17, and did business for himself and in his own name, and rented land and grew cotton at his own expense, cotton belonged to him, and not to his father.—Turner v. Brown, Tex., 200 S. W. 1161.

83.——Failure to Provide.—Where misconduct of one in another state compelled his wife and children to leave him and they came to Kansas without his knowledge or consent, and she therein obtained a divorce on personal service and custody of children, requiring him to make payment for support, he may thereafter, while in another state, be guilty of violation of Gen. St. 1915, § 3410, by failing to provide for children.—State v. Wellman, Kan., 170 Pac. 1052.

84. **Principal and Agent** — Imputability.—Knowledge of agent who had charge of parcel of land and as attorney in fact executed conveyance for principal as to appurtenances of land conveyed is imputable to principal.—Gartlan v. C. A. Hooper & Co., Col., 170 Pac. 1115.

85. **Railroads**—Last Clear Chance.—In action for death of infant run down by train, fact that engineer, on discovering infant, did not reverse engine, does not show that he failed to use all means at hand to stop train; it appearing that he cut off power, and evidence showing that to reverse lever would have had no effect on checking train's speed.—Chesapeake & O. Ry. Co. v. Price's Adm'r, Ky., 200 S. W. 927.

86.——Look and Listen.—Testimony by plaintiff, who was struck in nightime by train coming down grade by force of gravity merely, and which bore no light, locomotive coming tender first, that he stopped, looked, and listened, cannot be rejected as contrary to physical facts, and verdict by jury based thereon overturned.—Philadelphia & R. Ry. Co. v. Skerman, U. S. C. C. A., 247 Fed. 269.

87.——Nuisance.—A roundhouse constituting a nuisance, it was no defense to railroad in action for damages therefrom that it was more convenient to construct and operate it at that place than another, that in constructing and operating it the railroad neither "took" nor "destroyed" plaintiff's property, or that the railroad was not negligent in constructing or operating it.—Texas & P. Ry. Co. v. Taylor, Tex., 200 S. W. 1117.

88. **Sales**—Completion of Sale.—Where a contract of sale is made for a specific article to be charged for, and where there is nothing more to do except to deliver it and collect the price, the sale is complete without delivery or payment.—State v. Swift & Co., Mo., 200 S. W. 1066.

89. **Street Railroads**—Right of Way.—Under Brooklyn ordinance giving right of way to vehicles going north or south over those going east or west, if a west-bound automobile got within the square formed by the intersection of two streets before the trolley car reached such square, the trolley car would not, as a matter of law, have the right of way.—Boston Ins. Co. v. Brooklyn Heights R. Co., N. Y., 169 N. Y. S. 251.

90. **Surety Company** — Estoppel. — Where claimant against the surety of a jitney bus driver knew others injured in the same accident were asserting their claims, and failed to act diligently, leaving the surety to act in the belief that he had abandoned his claim, and pay other claims exhausting the bond, he was estopped from holding the surety.—Darrah v. Lion Bonding & Surety Co., Tex., 200 S. W. 1101.

91. **Trusts**—Evidence.—Where title of defendant to Kansas land was attacked on ground that property was paid for with moneys obtained from mining claim, which husband, who paid consideration, held in trust for complainant's assignor, evidence held insufficient to establish trust.—Anderson v. Hultberg, U. S. C. C. A., 247 Fed. 273.

92. **Vendor and Purchaser**—Implied Agreement.—Sale, or reasonable effort to sell, in a reasonable time, is implied as term of agreement, on which plaintiffs conveyed to defendant for money advanced, that when he sold he would divide the excess proceeds with them.—Campbell v. Kennedy, Cal., 170 Pac. 1107.

93.——Promoter.—Where land company sold land to promoter who agreed to make improvements, subdivide land, and reimburse company from payments made to him by purchasers, and he defaulted, land company, in absence of collusion with him, was not liable for fulfillment of his contracts with purchasers.—Vera Land Co. v. Metcalf, Wash., 170 Pac. 1012.

94. **Waters and Water Courses**—Private Water Rights.—Plaintiff's right to establish her private water right against public served by defendant corporation would be measured not by amount claimed by her predecessors, but by amount which had been actually taken for beneficial use on land to which appurtenant.—Hudson v. Ukiah Water & Improvement Co., Cal., 171 Pac. 93.

95.——Rates.—Where a water company declares that it will not furnish water except at a particular rate, a landowner entitled to water at a lower rate need not demand any specific amount or tender payment.—Henrici v. South Feather Land & Water Co., Cal., 170 Pac. 1135.

96. **Wills**—Construction.—Where will devised life estate to widow with remainder to H. and W. in equal shares, but if W. dies without issue his share to go to H., held, that W. succeeded to full fee-simple title where the life tenant and H. died after death of testator, and H.'s sole heirs conveyed to W. who is married and has children.—Wichard v. Craft, N. C., 95 S. E., 94.

97.——Construction.—Will directing wife to set aside from surplus of annual net income portion she deems proper to create sinking fund for grandchildren, until $5,000 accumulates, any deficit to be made out of estate, to be divided among beneficiaries equally, grants general legacy, payable from personalty, unless grounds for charging it on realty are shown.—In re Lynch's Will, N. Y., 169 N. Y. S. 321.

98.——Construction.—A will, the residuary clause of which provides an apportionment of the residue among "immediate relatives," held to apply to blood relatives only.—McMenamy v. Kampelmann, Mo., 200 S. W. 1075.

99.——Domicile.—Where testatrix died domiciled in town in Massachusetts, primary proof of will presumably should have been made in county where she died, but Surrogate's Court of New York also had jurisdiction to admit will to probate, where she owned bonds of New York corporations, a New York mortgage bond, and an interest in her deceased husband's realty in New York.—Morrison v. Haas, Mass., 118 N. E., 893.

100.——Res Judicata.—That a guardian had been appointed for a testator on application, stating that he was of unsound mind, is not conclusive against testamentary capacity.—In re Hanrahan's Estate, Iowa, 166 N. W. 529.